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No. 00-447

In the Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the bankruptcy court had the authority to enjoin the automatic cancellation of 63 wireless telecommunications licenses by the FCC due to the winning bidder's failure to timely pay the winning bid amount.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 217 F.3d 125. The opinion of the bankruptcy court (Pet. App. 30a-100a) is reported at 244 B.R. 253. The appeals court's earlier opinion (Pet. App. 101a-139a), the mandate of which the present opinion enforces, is reported at 200 F.3d 43. A petition for a writ of certiorari from that earlier decision was denied on October 10, 2000 (No. 99-1980).

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2000. A petition for rehearing was denied on August 23, 2000. The petition for a writ of certiorari was filed on September 21, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934, as amended, establishes a system for licensing the use of radio spectrum, 47 U.S.C. 301, and vests in the Federal Communications Commission (FCC or Commission) the authority to grant radio licenses where the agency finds that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a). Accord 47 U.S.C. 309(a).

In 1993 Congress authorized the Commission to grant initial licenses for spectrum dedicated to certain commercial services through "a system of competitive bidding," or auction. 47 U.S.C. 309(j)(1). In Congress's view, a system of public auctions would eliminate unproductive speculation, because those who do not have an immediate plan to put spectrum to valuable use will generally be unwilling to pay for it. "Because new licenses would be paid for, a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free." H.R. Rep. No. 111, 103d Cong., 1st Sess. 249 (1993).

Section 309(j) directs the Commission to develop a competitive bidding methodology that, among other things, (1) aids in the "development and rapid deployment of new technologies, products, and services," (2) avoids excessive concentration of licenses, (3) recovers "a portion of the value of the public spectrum resource made available for commercial use," and (4) promotes "efficient and intensive use of the electronic spectrum." 47 U.S.C. 309(j)(3)(A)-(D) (1994 & Supp. IV 1998). Pursuant to that authority, the Commission established a system of simultaneous multiple round auctions for awarding broadband personal communications services (PCS) licenses. See *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd

5532, ¶ 27 (1994).[1] The Commission concluded that such a system of competitive bidding would best serve the interests identified by Congress. *Ibid.* The Commission explained:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum.

See *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 71 (1994) (internal quotation marks and footnote omitted). Accord 9 FCC Rcd 5532, ¶ 29 (multiple round auctions "increas[e] the likelihood that" licenses will be "acquired by those who value them most highly").

To ensure the integrity of competitive bidding as a system of license allocation, the FCC's auction rules specify that any license grant is "conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a) (1996). In the case of companies that elect to pay for their licenses in installments, the rules provide that any "license granted * * * shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. 1.2110(e)(4) (1996). Failure to make timely payment triggers automatic cancellation of the license. 47 C.F.R. 1.2110(e)(4)(iii) (1996).

2. Pursuant to the competitive bidding provisions of 47 U.S.C. 309(j) (1994 & Supp. IV 1998), the FCC auctioned 493

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[1] Broadband PCS permits a "new generation of communications devices that will include small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities." 9 FCC Rcd 5532, ¶ 3.

"C Block" broadband PCS licenses in the summer of 1996. Pet. App. 104a.[2] Petitioner NextWave Personal Communications Inc. (NextWave) was declared the high bidder for 63 of those licenses after it submitted winning bids totaling $4.74 billion. *Id.* at 2a.[3] After a delay created by the fact that NextWave's percentage of foreign ownership exceeded regulatory limits, *id.* at 106a, the licenses were issued. *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030, ¶¶ 8-9 (1997). About the same time, NextWave deposited funds sufficient to bring its downpayment up to ten

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[2] For bidding purposes, the FCC divided the spectrum for broadband PCS into six blocks, denominated by the letters "A" through "F." See 9 FCC Rcd 5532, ¶ 6. Each of the A and B block licenses covered one of the 51 Major Trading Areas in the United States and its territories, as identified by the Rand-McNally Commercial Atlas & Marketing Guide; each of the C, D, E, and F block licenses covered one of the 493 Basic Trading Areas identified by the same Guide. *Ibid.* The A, B, and C Block licenses covered 30 MHz of spectrum each; the D, E, and F Block licenses covered 10 MHz of spectrum each. *Ibid.* In accordance with the statute's mandate that the FCC avoid "excessive concentration of licenses" and promote the dissemination of licenses "among a wide variety of applicants," 47 U.S.C. 309(j)(3)(B); see also 47 U.S.C. 309(j)(4)(C) and (D) (1994 & Supp. IV 1998), the C-Block auction was open only to applicants with less than $125 million in gross revenues during the previous two years, and assets totaling less than $500 million at the time of the auction. 47 C.F.R. 24.709(a)(1) (1996). Applicants eligible for the C-Block auction were required to pay only ten percent of their winning bid in cash by the time of the license grant, 47 C.F.R. 24.711(a)(2), with the remaining balance to be paid in installments over the ten-year license term at below-market interest rates, 47 C.F.R. 24.711(b). For an applicant—such as NextWave—that qualified as a "small business," the interest rate was the rate for ten-year U.S. Treasury obligations on the day the license was granted, with interest-only payments for the first six years. 47 C.F.R. 24.711(b)(3).

[3] The petition for a writ of certiorari was filed by petitioner NextWave and various affiliated companies; we use the term petitioner to refer to all petitioners.

percent of its winning bids, Pet. App. 106a; see 47 C.F.R. 24.711(a)(2), and executed promissory notes for the remaining 90 percent of its bid. Pet. App. 106a.

The licenses themselves—like the text of petitioner's note and Security Agreement—made it clear that the licenses were conditioned on "full and timely payment of all monies due" and that failure to comply with that requirement "will result in the automatic cancellation of" the licenses. Gov't C.A. App. 58, 60 (NextWave Radio Station Authorization).[4] The Commission's rules made that clear as well. See 47 C.F.R. 1.2110(e)(4) (1996) ("A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations."); *ibid.* ("Following expiration of any grace period without successful resumption of payment * * * or upon default * * * the license will automatically cancel.").

3. At the request of NextWave and other C-Block licensees, on March 31, 1997, the FCC instituted a proceeding to consider whether and to what extent to restructure the obligations of the C-Block licensees; pending the proceeding, it stayed C-Block payment requirements. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16,436, ¶¶ 14-17 (1997). The FCC ultimately adopted several options designed to assist C-Block licensees in restructuring their obligations, but decided against adopting proposals that would "result in a dramatic forgiveness of the debt owed." *Id.* ¶ 19. The Commission ultimately gave licensees until June 8, 1998, to

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[4] NextWave's note stated that the license was "conditioned upon full and timely payment of financial obligations under the Commission's installment payment plan," and that the Commission's "enforcement authority" would not be affected. NextWave's security agreement stated that "its continued retention of the License" was "conditioned on compliance" with all Commission orders and regulations.

elect whether to avail themselves of the options for restructuring their obligations, and until October 29 (at the latest) to resume payments consistent with their June 8 election. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licensees*, 14 FCC Rcd 6571, ¶ 3 (1999).

Petitioner unsuccessfully sought to obtain a stay of the election deadline from the FCC, see *In re Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date*, 13 FCC Rcd 11,880 (1998), and from the D.C. Circuit, see *NextWave Telecom Inc.* v. *FCC*, No. 98-1255, 1998 WL 389116 (June 11, 1998). Petitioner also filed for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. At the same time, petitioner commenced an adversary proceeding against the FCC to avoid its $4.7 billion obligation as a constructive fraudulent conveyance under 11 U.S.C. 544(b) (1994 & Supp. IV 1998). Pet. App. 3a-4a. Petitioner did not make an election by the June 8, 1998 deadline; it did not resume making, by October 29, the payments that were an express condition of its licenses; and it made no effort to obtain any agreement or assurance from the Commission as to the effect of its bankruptcy filing. See *In re Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications, Inc., et al. Petition for Reconsideration*, FCC No. 00-335, 2000 WL 1262652, ¶¶ 5, 10 (Sept. 6, 2000). Meanwhile, the vast majority of other C-Block licensees made their elections by the deadline and either made payments or lost their licenses through operation of the automatic cancellation rule.

The bankruptcy court held that much of petitioner's payment obligation for the licenses was subject to avoidance as a constructive fraudulent conveyance. Pet. App. 4a. The court therefore reduced the amount that petitioner was

required to pay for the C-Block licenses from the $4.74 billion that had originally been bid, to a little less than $1.023 billion, while at the same time allowing petitioner to retain the licenses during its reorganization in bankruptcy. See *ibid.* The district court affirmed. *Id.* at 4a-5a.

4. The court of appeals reversed and remanded the case for further proceedings. Pet. App. 101a-139a. The court held that the bankruptcy court "had no authority * * * to interfere with the FCC's system for allocating spectrum licenses, and that in any event it wrongly concluded that the [l]icenses were fraudulently conveyed." *Id.* at 104a. The appeals court ruled that because the FCC, and not the courts, has been vested by the Communications Act with the power to grant and condition licenses for the use of the radio spectrum, it is "beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject." *Id.* at 121a.

As the court explained, "[t]he FCC had not sold NextWave something that the FCC had owned; it had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." Pet. App. 121a. Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Ibid.* Instead, "[i]t indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* In other words, "[b]y holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion, the bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the [l]icenses to an entity that the FCC determined was not entitled to them." *Id.* at 122a. The court

of appeals also held that "the transaction in which the [l]icenses were issued was * * * not constructively fraudulent." *Id.* at 125a.[5] NextWave filed a petition for a writ of certiorari from the appeals court's decision, which was denied on October 10, 2000. See *NextWave Personal Communications, Inc.* v. *FCC*, No. 99-1980 (order denying certiorari).

5. Meanwhile, on December 16, 1999, after the court of appeals had announced its decision but before it had issued its opinion, petitioners filed modifications to their proposed plan of reorganization providing that they would pay their overdue obligation in full and undertake to pay future installment payments as they came due. Pet. App. 8a; see also *id.* at 42a. On January 11, 2000, petitioners "sweetened [their] offer" and proposed paying the present value of the entire winning bid in a single lump sum. *Id.* at 8a-9a; see also *id.* at 42a. The FCC rejected the offer. In objections to petitioners' proposed modifications filed on January 12, the agency explained that the licenses had "automatically cancel[led]," pursuant to its rules, for nonpayment of the winning bid. *Id.* at 9a (citation omitted). The same day the agency issued a Public Notice scheduling the licenses previously held by NextWave for re-auction. *Ibid.* The auction is now scheduled for December 12, 2000. See FCC Public Notice, DA 00-2038 (Sept. 6, 2000).

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[5] Relying on the FCC's rules, the court held that "the close of the auction" marked the time at which NextWave became obligated to pay its bid price. Pet. App. 129a. At that time, the court stated, the value of the licenses was "by definition * * * $4.74 billion, since 'the fair market values of the C-Block licenses were equivalent to the bids accepted by the FCC at the close of the auction and reauction.'" *Id.* at 126a (citation omitted). And because the "fair market value was $4.74 billion * * * there was no constructive fraud." *Ibid.* Petitioner does not in the present petition seek review of that ruling. See also note 20, *infra*.

Petitioners thereupon filed a motion in the bankruptcy court for a ruling declaring "null and void" the FCC's actions in announcing that the licenses had automatically lapsed. Pet. App. 32a. The bankruptcy court granted petitioners' motion. *Ibid.* The court recognized that "there has been a delay in payment of principal and interest" on petitioners' C-Block obligations. *Id.* at 44a. The court nonetheless held that the FCC's actions in announcing that the licenses had lapsed violated, among other things, the Bankruptcy Code's automatic stay, *id.* at 50a-54a; see 11 U.S.C. 362(a), and contravened the Code's prohibition against discriminatory treatment of debtors by reason of their bankruptcy, Pet. App. 57a-61a; see 11 U.S.C. 525(a).

The bankruptcy court recognized that the court of appeals, in its earlier opinion, had held that the FCC's full payment requirement is regulatory in nature, because it protects the integrity of the auctions as a method of license distribution, and ensures that licenses in fact are granted to the applicant that values them most highly. Pet. App. 82a. But the court declined to infer a regulatory purpose "with respect to the FCC's 'timely payment' requirement." *Ibid.* On the contrary, the court considered "timeliness" to have no "objective other than pure debtor-creditor economics." *Ibid.* See also *id.* at 59a ("The 'timely payment' requirement is purely economic."). In any event, the court questioned "whether there is any regulatory concern of such consequence that it should override the protections and policy considerations that lie at the very core of the Bankruptcy Code, or bar the jurisdiction of the Bankruptcy Court from enforcing the Code." *Id.* at 85a. Confirmation of petitioner's plan of reorganization was stayed "pending further order of the Court of Appeals." *Id.* at 87a.

On the FCC's petition, the court of appeals granted a writ of mandamus to enforce its mandate and directed the bankruptcy court to vacate its order. Pet. App. 1a-29a. The

court of appeals concluded that the FCC's decision to hold petitioner to timely as well as full payment was an exercise of the agency's regulatory authority which was beyond the authority of the bankruptcy court to modify. The court of appeals explained that "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 16a. Because "[t]ime of payment and amount of payment are alike functions of value," *ibid.* (citation omitted), "[t]here can be little doubt that if full payment is a regulatory condition, so too is timeliness," *ibid.*

The court of appeals rejected the bankruptcy court's reliance on the Bankruptcy Code's automatic stay provision, 11 U.S.C. 362(a). The court emphasized that the automatic stay was by its terms inapplicable to actions to enforce a governmental unit's "police or regulatory power." Pet. App. 22a (citing 11 U.S.C. 362(b)(4) (1994 & Supp. IV 1998)). It also rejected, as "flatly incompatible with [its prior] mandate," *ibid.*, the bankruptcy court's conclusion that the FCC was simply seeking to "enforce its pecuniary interests," *id.* at 67a.

The court of appeals also stated that, "[a]lthough the bankruptcy court's opinion is stated in terms of whether timely payment is a regulatory condition, the question posed and answered is whether the regulatory condition of timely payment is arbitrary." Pet. App. 19a. However, the appeals court stated, "a regulatory condition is a regulatory condition even if it is arbitrary," and it is only "for a court with power to review the FCC's decisions to say if they are arbitrary or valid." *Ibid.* In this case, the court pointed out, federal statutes provide that "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals." *Id.* at 25a (citing 47 U.S.C. 402(a) and (b); 28

U.S.C. 2342). The court of appeals stated that petitioners had filed in the D.C. Circuit and "remain[ed] free to pursue" those challenges to the FCC's actions under non-bankruptcy law. *Id.* at 27a.[6] The court concluded, however, "that the bankruptcy court acted in derogation of this Court's mandate and beyond its statutory jurisdiction when it nullified the FCC's Public Notice." *Id.* at 29a.

ARGUMENT

In *NextWave Personal Communications, Inc.* v. *FCC*, No. 99-1980 (Oct. 10, 2000), this Court denied a petition for a writ of certiorari from the court of appeals' earlier decision in this litigation, which held that the bankruptcy court lacked authority to require that petitioner be permitted to retain its spectrum licenses without satisfying the regulatory requirement that it fully meet its payment obligation. Enforcing its mandate through mandamus, the court of appeals in the present ruling held that its prior ruling also precludes the bankruptcy court from interfering with the FCC's requirement that winning bids be *timely* paid as a condition to holding the auctioned licenses. That decision is

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[6] On February 11, 2000, petitioner filed a petition for review and a notice of appeal of the FCC's Public Notice in the D.C. Circuit, see *NextWave Personal Communications, Inc.* v. *FCC*, Nos. 00-1045, 00-1046 (D.C. Cir.). On June 22, 2000, the court of appeals dismissed the actions as premature because the Commission had not yet ruled on a pending petition for reconsideration filed by petitioner. (On reconsideration, petitioner had both challenged the Second Circuit's conclusion that the licenses had been cancelled by operation of law, and asked the Commission to reconsider the cancellation.) The FCC denied reconsideration on September 6, 2000, *In re Public Notice DA 00-49*, 2000 WL 1262652, ¶¶ 10-26, and petitioner (on September 15, 2000) again filed a petition for review and a notice of appeal. See *NextWave Personal Communications, Inc.* v. *FCC*, Nos. 00-1402, 00-1403 (D.C. Cir.). Petitioner has moved for a stay of the Commission's December 12 auction date pending appeal, or in the alternative for expedited briefing. As of the date of this brief, that motion remains pending in the D.C. Circuit.

correct and does not conflict with the decision of any other court of appeals or this Court. Moreover, the likelihood that the precise issue presented by the petition—whether a bankruptcy court may override the FCC's regulatory rule that a winning bidder's failure to make required installment payments on time results in cancellation of its spectrum licenses—will recur is diminished now that the FCC has eliminated its installment payment program and requires payment in full *before* the license issues. See *In re Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, FCC No. 00-274, 2000 WL 1140602 ¶ 55 (released Aug. 14, 2000). Accordingly, further review is not warranted.

1. Under the Communications Act, the FCC is vested with authority to grant telecommunications licenses if the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a); see also 47 U.S.C. 309(a). Under the statute, the Commission "serve[s] as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication,'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968), and is "the expert body which Congress has charged to carry out its legislative policy," *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940). Thus, as this Court has recognized, "it is the Commission, not the courts, which must be satisfied that the public interest will be served" in the grant of a license, *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946), and "no court can grant an applicant an authorization which the Commission has refused," *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942).

Section 309(j) of the Act authorizes the Commission to allocate licenses for use of the electromagnetic spectrum through "a system of competitive bidding." 47 U.S.C. 309(j)(1). In promulgating the ground rules for such a system, the FCC proceeded on the premise—shared by

Congress—that auctions would ensure that spectrum is granted to the most efficient and effective user. *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 71 (1994) (because "a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services * * * and the efficient and intensive use of the spectrum"); *id.* ¶ 70 ("auction designs that award licenses to the parties that value them most highly will best achieve" statutory goals); H.R. Rep. No. 111, 103d Cong., 1st Sess. 249 (1993) (auctions "will ensure that spectrum is used more productively and efficiently than if handed out for free.").

The FCC's C-Block auction payment rules are an integral part of that allocative mechanism. Under those rules, all licenses are "conditioned upon full and timely payment of the winning bid amount," 47 C.F.R. 24.708(a) (1996), or "full and timely performance of the licensee's payment obligations under the installment plan," 47 C.F.R. 1.2110(e)(4) (1996). Absent such rules, bidders could submit bids that exceed their expected return on the spectrum—thereby obtaining spectrum that other users value more highly than they do—with impunity, undermining the Commission's allocative mechanism. Thus, as the court of appeals recognized in its earlier ruling in this case, the bankruptcy court's decision to permit petitioner to retain 63 broadband PCS licenses despite its refusal to pay what it had bid for them "had more than financial implications," Pet. App. 121a; it displaced the agency's licensing decisions. As the court of appeals explained, "NextWave's inability to follow through on its financial undertakings * * * indicated that under the predictive mechanism created by Congress to guide the FCC,

NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* "By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion," the bankruptcy and district courts "effectively award[ed]" C-Block licenses "to an entity that the FCC determined was not entitled to them" and thereby impermissibly "exercised the FCC's radio-licensing function." *Id.* at 122a-123a. "It is beyond the jurisdiction of a court in a collateral proceeding," the appeals court correctly concluded, "to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject." *Id.* at 121a.

Those principles apply with equal force where the issue concerns the *timing*, rather than the *amount*, of the required payment. As the court of appeals correctly understood, "[t]ime of payment and amount of payment are alike functions of value." Pet. App. 16a (citation omitted). It has long been recognized that "[t]ime is money," see *Thinking Machs. Corp.* v. *Mellon Fin. Servs. Corp. #1 (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1022 (1st Cir. 1995), and that a payment tardily made is less valuable than one that is made on time. By the same token, a bidder that is not held to the time limits for payment is free to submit a bid that does not accurately measure the value of the spectrum to it, thereby similarly upsetting the agency's mechanism for allocating spectrum to those who value it the most. As the FCC has explained, "[t]imeliness of * * * payments is a necessary indication * * * that the winning bidder is financially able to meet its obligations on the license and intends to use the license for the provision of services to the public," and serves to discourage "insincere or financially unqualified bidders from 'shopping' a winning bid in order to obtain financing for a down payment." *In re Southern Communications Sys., Inc.*, 12 FCC Rcd 1532, ¶ 6 (1997). See generally *Mountain*

Solutions, Ltd. v. *FCC*, 197 F.3d 512, 517-519 (D.C. Cir. 1999) (upholding FCC's refusal to waive requirement of timely downpayment for C-Block license as not arbitrary or capricious because default, among other things, serves as "an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public"). The court of appeals thus correctly concluded that "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." Pet. App. 16a. See also *ibid.* ("[t]here can be little doubt that if full payment is a regulatory condition, so too is timeliness").[7]

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[7] Abrogation of the timely payment requirement, moreover, would undermine the auction program and the FCC's regulations regarding payment for C-Block licenses. In response to requests for emergency relief from NextWave and other licensees, the Commission granted a suspension of payments to all C- and F-Block licensees, but declined to grant further relief because it would undermine the auction mechanism (which is designed to identify the highest-value user) and be unfair to unsuccessful bidders (who may have been willing to make payments that, once the time-value of money is accounted for, were of greater value). *In re Public Notice DA 00-49*, 2000 WL 1262652, ¶¶ 25-26. Moreover, allowing NextWave to avoid making required payments created an opportunity for precisely the sort of speculation that the auction mechanism was designed to avoid. See p. 2, *supra*; H.R. Rep. No. 111, 103d Cong., 1st. Sess. 248 (1993). In this case, NextWave initially refused to pay its full bid amount for its licenses, claiming that they had declined in value to about one-quarter of what it had bid; but now that the market value of those licenses has, in NextWave's view, increased dramatically, NextWave seeks to retain them by offering to pay its full bid amount. In the interim, Congress's goals have been undermined; NextWave has yet to offer a single service to a single customer. *In re Public Notice DA 00-49*, 2000 WL 1262652, ¶ 25; 47 U.S.C. 309(j)(3)(A) and (D) (1994 & Supp. IV 1998) (goal is to promote use of spectrum). Finally, just as surely as NextWave's default on its initial bid (and claim that the licenses were worth only one-quarter of its bid) casts serious doubt on whether it was the bidder that

2. Petitioner does not seriously contest the fact that the FCC's timely payment requirement is an important regulatory feature of its license allocation mechanism.[8] Instead, as in its earlier petition for a writ of certiorari, petitioner contends (Pet. 11-12) that the court of appeals' decision contravenes 28 U.S.C. 1334(b), which vests the district courts (and, by reference, the bankruptcy courts) with "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11," "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction *on a court or courts other than the district courts*." 28 U.S.C. 1334(b) (emphasis added). But as the text of the statute indicates—and as this Court has recognized—"Section 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other '*courts*,' and, of course, an administrative agency * * * is not a 'court.'" *Board of Governors* v. *MCorp Fin. Inc.*, 502 U.S. 32, 41-42 (1991). Accord 1 L. King, *Collier on Bankruptcy* ¶ 3.01[4][a], at 3-17 (15th ed. 2000). Thus, petitioners' attempt to discern a conflict between the decision below and appeals court decisions which have found that 28 U.S.C. 1334(b) "confers bankruptcy-court jurisdiction * * * despite the existence of statutes purporting to grant exclusive jurisdiction to a different court" (Pet. 16), is misguided. The infirmity in the bankruptcy court's decision was not simply that it intruded into the exclusive jurisdiction of the courts of appeals over

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valued the spectrum most highly, its newfound willingness to pay its *original* bid amount *following* an allegedly dramatic increase in the licenses' market value does nothing to alter that concern. A bid made in 1996 and since defaulted on bears no relation to identification of the applicant best qualified to hold the spectrum under the market allocation mechanism intended by Congress.

[8] To the extent petitioner does dispute that issue, the dispute has no continuing importance given the FCC's elimination of its installment payment program. See p. 12, *supra*.

FCC licensing decisions, see 47 U.S.C. 402; 28 U.S.C. 2342, but that it intruded on the powers Congress reserved for the FCC. Indeed, the district court in effect arrogated to itself the FCC's exclusive administrative authority to issue spectrum licenses and set their terms and conditions.[9]

For that reason, there is no conflict between the decision below and the Section 1334(b) decisions cited by petitioner. See Pet. 16-19. The Fifth Circuit's unpublished denial of a stay pending appeal in the litigation over the C-Block licenses awarded to GWI and its subsidiaries, see *In re United States*, No. 98-11123 (Oct. 7, 1998), cited Pet. 18-19, did not resolve the merits of the government's appeal. Moreover, after petitioner filed its petition, the Fifth Circuit addressed the merits of the government's appeal, *United States* v. *GWI PCS 1 Inc. (In re GWI PCS 1 Inc.)*, No. 99-11294, 2000 WL 1528690 (Oct. 20, 2000), and specifically avoided deciding the question on which petitioner seeks review. Instead, as explained below (pp. 28-30, *infra*), the Fifth Circuit resolved the FCC's appeal from an order confirming a reorganization plan by reference to a doctrine called "equitable mootness," which has no application in the present case. Indeed, the

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[9] After the FCC announced that petitioner's licenses had automatically cancelled and that it would re-auction them, petitioner (on February 11, 2000) filed a petition for review and a notice of appeal of the FCC's Public Notice in the D.C. Circuit, see *NextWave Personal Communications, Inc.* v. *FCC*, Nos. 00-1045, 00-1046 (D.C. Cir.). On June 22, 2000, the court of appeals dismissed that suit as premature, because petitioner had a petition for reconsideration pending before the Commission. It is difficult to see how, if the D.C. Circuit lacked jurisdiction because the matter was still pending before the agency, the bankruptcy court could have jurisdiction. To the contrary, any authority granted bankruptcy courts by Section 1334(b) is "concurrent" with the otherwise exclusive jurisdiction accorded to other courts, *MCorp.*, 502 U.S. at 41. Because the D.C. Circuit did not have jurisdiction over the matter here (in light of its continued pendency before the FCC), the bankruptcy court necessarily could not have had "concurrent" jurisdiction.

Fifth Circuit expressly agreed that the district court "possibly erred in permitting avoidance and enjoining the FCC from revoking the * * * debtor's licenses for failing to remit the full bid price, thereby taking onto itself a quasi-regulatory function held by the FCC," 2000 WL 1528690, at *9, and stated that, "if the issue were not equitably moot," it "might agree with the Second Circuit and reverse the bankruptcy court's avoidance judgment," *id.* at *15 n.31. See also pp. 28-29, *infra*.

The other appeals court decisions upon which petitioner relies all deal with court, not agency, jurisdiction. See Pet. 16-19. Thus, *Quality Tooling, Inc.* v. *United States*, 47 F.3d 1569 (Fed. Cir. 1995), cited Pet. 16-17, involved whether the bankruptcy court, rather than the Court of Federal Claims, could hear a government contracts dispute; and *Brock* v. *Morysville Body Works, Inc.*, 829 F.2d 383 (3d Cir. 1987), cited Pet. 17, concerned whether the bankruptcy court, rather than the court of appeals, could enforce an order by the Occupational Safety and Health Administration (OSHA) to abate health and safety violations. In *Brock*, moreover, the court of appeals—not the bankruptcy court—adjudicated OSHA's request for enforcement, and it did so under a provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660; it did not purport to act under Section 1334(b). See 829 F.2d at 386. Finally, *In re Town & Country Home Nursing Services, Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991), and *In re University Medical Center*, 973 F.2d 1065, 1073-1074 (3d Cir. 1992), cited Pet. 17-18, both involved the issue of exhaustion of administrative remedies for claims asserted under the Medicare Act. In neither of those two cases was there any contention that the agency involved had acted in a regulatory capacity; to the contrary, the disputes concerned

actions—the withholding or offset of payments—that everyone assumed to be purely financial in nature.[10]

Moreover, even if one were to assume, *arguendo*, that Section 1334(b) accorded the bankruptcy court jurisdiction over the FCC's actions equivalent to that vested in the courts of appeals under the Hobbs Act, 28 U.S.C. 2342, and the Communications Act, 47 U.S.C. 402, any such review would be limited to the deferential, on-the-agency-record, Administrative Procedure Act examination conducted under those Acts. It would not permit the bankruptcy court to decide that the FCC must allow NextWave to retain its licenses without regard to full and timely satisfaction of the payments upon which award of the licenses was conditioned. See *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952) ("When the court decided that the license should issue without the conditions [imposed by the agency], it usurped an administrative function," and power to review orders "is not power to exercise an essentially administrative function."). Yet that is what the bankruptcy court attempted to do here.

Indeed, the district court's attempt to order that petitioner retain the licenses directly contravened the Communications Act. Section 301 of that Act expressly declares that no "license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. 301. In this case, the licenses—by their express terms—were conditioned on full and timely payment of the winning bid amounts, and unequivocally stated that failure to meet that

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[10] *In re Gruntz*, 202 F.3d 1074, 1083 (9th Cir. 2000), similarly does not create a conflict regarding the scope of Section 1334(b). See Pet. 18. In that case, the Ninth Circuit merely rejected the argument that Section 1334(b) confers jurisdiction on (*i.e.*, is an affirmative grant of authority to) state courts to grant relief from the automatic stay. See 202 F.3d at 1082-1083.

condition would cause the licenses' automatic cancellation.[11] The FCC's regulations made that clear as well. 47 C.F.R. 1.2110(e)(4)(iii) (1996) ("Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the *license will automatically cancel.*") (emphasis added). See also p. 5 & note 4, *supra*. The district court had no authority to order that petitioner be permitted to retain the licenses in contravention of the licenses' express terms and conditions. Cf. *In re Gull Air, Inc.*, 890 F.2d 1255, 1261-1262 (1st Cir. 1989) (court could not, under bankruptcy law, preserve rights granted by the FAA where those rights expired by operation of law); *Moody* v. *Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir.) (bankruptcy law does not create property rights where they would not otherwise exist), cert. denied, 469 U.S. 982 (1984).[12]

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[11] The licenses, in fact, could not have been clearer: "This authorization *is conditioned upon the full and timely payment* of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the *automatic cancellation* of this authorization." Gov't C.A. App. 58, 60 (NextWave Radio Station Authorization) (emphasis added).

[12] Petitioner also errs in asserting (Pet. 21) that the court of appeals' decision permits agencies to escape bankruptcy court jurisdiction merely by characterizing their decisions as "regulatory." Under the court of appeals' decision, the bankruptcy court did have jurisdiction to determine whether or not the FCC's rules were regulatory. The court of appeals merely—and correctly—reversed the bankruptcy court's resolution of that issue. See Pet. App. 15a-17a. Nor is petitioner correct to argue (Pet. 20-22) that the court of appeals' decision will necessary have a broad impact with respect to many statutes according particular courts exclusive jurisdiction. The court of appeals' initial decision in this case was quite clearly premised, and relied extensively, on the unique and exclusive role the FCC has in regulating the allocation of spectrum and radio licenses. See Pet. App. 113a-121a. See also *id.* at 7a-8a. So too does the current

3. Petitioner also renews the contention (Pet. 14) that the decision below is "inconsistent with" 28 U.S.C. 1334(e), which provides the district courts (and again, the bankruptcy courts by reference) with jurisdiction over "all of the * * * property of the estate." As petitioner concedes, however, the court of appeals "did not expressly address whether FCC licenses are property of the estate for bankruptcy purposes." Pet. 14. It is therefore hard to see how the decision can be taken as binding authority on point (or as creating a conflict for that matter).

Besides, spectrum licenses are not property—much less property of the estate—vis-à-vis the FCC's exercise of regulatory authority, and petitioner cites no appellate decision holding otherwise. As this Court has long recognized, "[t]he policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). The statute "provide[s] for the use of [radio] channels, but not the ownership thereof," and states expressly that "no [radio] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. 301. When Congress authorized a system of competitive bidding, it made clear that the same rule would apply: Nothing in Section 309(j), Congress specified, shall "diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses," or "be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses." 47 U.S.C. 309(j)(6). In short, "[l]icenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 394 (1969).

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opinion, which enforces the prior decision on mandamus. See *id.* at 14a-19a.

Petitioner nonetheless points to several cases that, in its view, "hold[] or assum[e]" that FCC licenses are property of the estate. Pet. 14. But none of those decisions suggests that the bankruptcy court thereby acquires the power to interfere with the *FCC's* regulatory authority when it comes to licensing.[13] Thus, *In re Tak Communications, Inc.*, 985 F.2d 916, 917-919 (7th Cir. 1993), cited Pet. 14, concerned an effort by private creditors to obtain a lien on an FCC license. The court of appeals, moreover, *refused* to allow a security interest in a broadcast license, emphasizing that "[w]hether to permit such interests is * * * a matter for the FCC rather than the courts to decide." *Id.* at 919. Similarly, in both *In re Central Arkansas Broadcasting Co.*, 68 F.3d 213, 214-215 (8th Cir. 1995), and *In re Atlantic Business & Community Development Corp.*, 994 F.2d 1069, 1071 (3d Cir. 1993), cited Pet. 14, the licenses at issue had been transferred with FCC approval; as a result, the FCC's regulatory interests were no longer at issue. Neither case suggests that the bankruptcy court may consider an FCC license to be "property of the estate" as against the FCC's assertion of regulatory authority.

Finally, there is serious reason to doubt that the "property of the estate" question is properly presented by this petition. Even if petitioner's interest in its license could have been, at some point, characterized as property of the estate, that characterization does not permit the bankruptcy

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[13] The FCC long has taken the position that, even if spectrum licenses may provide licensees with rights vis-à-vis other private parties, Section 301 bars licensees from claiming that a license accords them any right in the nature of property against the FCC itself. See *In re Application of Bill Welch*, 3 FCC Rcd 6502, ¶ 11 (1988) (noting that, although Section 301 does not preclude for-profit sales of licenses subject to FCC approval, it does ensure that "the Federal Government retain[s] ultimate control over radio frequencies, as against any rights, especially property rights, that might be asserted by licensees"); *id.* ¶ 13 (Section 301 restriction relates "to a licensee's rights vis-a-vis the Federal Government").

court to expand the scope of the property right in the name of preserving it. As explained above, petitioner lost any proprietary interest in its licenses when they automatically lapsed following petitioner's failure to meet the timely payment requirement. Thus, whether or not petitioner's interest in the licenses was ever "property of the estate," petitioner ceased to have any interest in the licenses upon their automatic cancellation. In that respect, the First Circuit's decision in *Gull Air* is on-point. In *Gull Air*, the debtor claimed that landing slots, issued by the FAA, were property of the estate. The debtor, however, failed to meet a requirement for retention of those landing slots, resulting in their automatic withdrawal. The First Circuit concluded that, "[r]egardless of whether" the debtor's "proprietary interest * * * rises to the level of 'property of the estate,'" the bankruptcy court could not control slot allocation following the debtor's default because the debtor had "lost its limited propriety interest by its failure to satisfy a qualifying condition." *Gull Air*, 890 F.2d at 1261. The same thing is true here.[14]

4. Alternatively, petitioner claims the court of appeals' decision is inconsistent with a variety of other Bankruptcy Code provisions, including 11 U.S.C. 106(a) (addressing bankruptcy court authority to decide bankruptcy law issues

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[14] Nor does the Fifth Circuit's ambiguous reference to "property of the estate" in footnote 29 of its *GWI* decision create a conflict. As noted above (p. 18, *supra*), the Fifth Circuit expressly stated that it might agree with the Second Circuit that bankruptcy courts exceed their authority when they interfere with the FCC's regulatory licensing decisions, and it is not clear whether the property of the estate to which the Fifth Circuit referred was the licenses, possible financing, or the money to be paid for the licenses. Moreover, in *GWI*, the debtor did not miss any payments, and the debtor obtained express judicial approval for its payment program. As a result, in *GWI*, the issue of automatic cancellation never arose. Here, in contrast, petitioner made no payments and its licenses automatically lapsed.

relating to "governmental units"), 11 U.S.C. 362(b)(4) (1994 & Supp. IV 1998) (the automatic stay provision), and 11 U.S.C. 525(a) (proscribing governmental discrimination against bankrupt entities). The decision below, however, did not expressly address many of those provisions; petitioner does not claim that the decision conflicts with the decision of any other court of appeals addressing those provisions; and petitioner's claims of error are wholly without merit in any event.

a. Petitioner asserts (Pet. 12-13) that the court of appeals' decision "nullifies" 11 U.S.C. 106(a), which provides that the bankruptcy court may hear and determine issues arising under specified sections of the Bankruptcy Code even where the matter relates to "governmental units." But that provision merely waives the government's sovereign immunity with respect to particular issues. See 11 U.S.C. 106(a) ("sovereign immunity is abrogated as to a government unit to the extent set forth in this section"). It does not purport to effect a wholesale transfer of responsibilities and powers from expert federal administrative agencies to federal bankruptcy courts.

Consistent with that, the court of appeals never held that the bankruptcy court "lacked jurisdiction over every aspect of the relationship between the FCC and NextWave." Pet. App. 123a. To the contrary, the court of appeals' initial decision made clear that, "[t]o the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors" and subject to bankruptcy court authority. *Ibid.* Thus, the court stated, "[i]f the [l]icenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt." *Id.* at 124a-125a. (Indeed, it was for

that reason that the court of appeals addressed the fraudulent conveyance issue, since it might affect the amount of NextWave's potentially dischargeable obligations to the FCC following the cancellation of the licenses. See *ibid.*) The fact that the Bankruptcy Code may vest the bankruptcy court with authority to address the agency's claim—*i.e.*, its demand for money from the estate—does not empower the bankruptcy court to exercise the agency's federal administrative and regulatory authority over the allocation of spectrum licenses.

Indeed, the Bankruptcy Code specifically recognizes the propriety of actions taken by a "governmental unit" to enforce its "police or regulatory power" by expressly excepting such actions, under 11 U.S.C. 362(b)(4) (1994 & Supp. IV 1998), from the reach of the automatic stay. And as the court of appeals correctly concluded in this case, the FCC is "[u]ndoubtedly * * * a governmental unit that is seeking 'to enforce' its 'regulatory power.'" Pet. App. 22a. For the same reasons, petitioner's further assertion (Pet. 13 n.7) that the decision conflicts with the Bankruptcy Code's automatic stay provision, 11 U.S.C. 362 (1994 & Supp. IV 1998), is devoid of merit; the regulatory actions at issue here lie at the core of the exemption provided by Section 362(b)(4). Moreover, because the licenses became cancelled automatically by operation of law, their cancellation does not constitute "an administrative action or proceeding against the debtor falling within the purview of section 362(a)(1) of the Bankruptcy Code." *Gull Air*, 890 F.2d at 1263.

b. Contrary to petitioners' argument (Pet. 13-14), the decision below also does not contravene (much less make a "mockery of") 11 U.S.C. 525(a). As Section 525(a)'s heading ("Protection against discriminatory treatment") and full text attest,[15] Section 525 "protects bankruptcy debtors from

[15] In relevant part, Section 525(a) declares that, except as provided in certain statutes, "a governmental unit may not deny, revoke, suspend, or

various forms of *discrimination* based upon the filing [of] a bankruptcy case, insolvency prior to a bankruptcy case or nonpayment of a debt that was discharged in a bankruptcy case." 4 *Collier, supra,* ¶ 525.01, at 525-3 (emphasis added). By its terms, the provision declares that "a governmental unit may not * * * revoke * * * a license * * * *solely* because [the] debtor * * * has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a) (emphasis added). Consequently, where an agency merely enforces a nondiscriminatory financial requirement—one that is applicable whether or not a party has filed for bankruptcy—such as requiring "financial responsibility in a particular licensing process," Section 525(a) "is not applicable." 4 *Collier, supra,* ¶ 525.02, at 525-5. See S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978) (Section 525 "does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.").[16]

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refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title * * * solely because such bankrupt or debtor is or has been a debtor under this title * * * has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act." 11 U.S.C. 525(a).

[16] The House Report explains that, "where the causes of a bankruptcy are intimately connected with the license * * * an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy." H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977).

That precisely describes the FCC's nondiscriminatory timely payment requirement. Under the FCC's rules, all licensees lose their spectrum rights upon failure to make full and timely payments—whether or not they file for bankruptcy—because nonpayment "indicate[s] that under the predictive mechanism created by Congress to guide the FCC, [they are] not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted," Pet. App. 121a, and because default serves as "an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public," *Mountain Solutions*, 197 F.3d at 518.[17]

Section 525, moreover, applies only where the governmental action is based on a failure to pay "a debt that is dischargeable" in the bankruptcy case. 4 *Collier*, *supra*, ¶ 525.02, at 525-5; *e.g.*, *Johnson* v. *Edinboro State Coll.*, 728 F.2d 163, 165 (3d Cir. 1984). In this case, a licensee's full and timely payment of its winning bid installments is an essential condition of its license grant; payment thus is a regulatory requirement, not a dischargeable debt. Indeed, the court of appeals specifically held that, so long as the licensee retains the licenses, the payment obligation (like all other license terms) is not subject to modification or discharge in bankruptcy. See pp. 7-8, 10, *supra*. Because the license payment

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[17] Petitioner's claim that Section 525(a) should provide "meaningful protection against federal agency license revocations" is thus misleading. Pet. 13. Section 525 is not designed to give licensees in bankruptcy greater rights in their licenses than the rights held by non-bankrupt entities. Nor is it designed to permit licensees to retain licenses in bankruptcy notwithstanding their failure to meet regulatory requirements. Instead, Section 525 is designed to codify this Court's decision in *Perez* v. *Campbell*, 402 U.S. 637 (1971), by barring *discrimination* that would otherwise interfere with the Bankruptcy Code's fresh start policy. See 4 *Collier*, *supra*, ¶ 525.02, at 525-4. The license cancellation at issue here has no effect on that substantive bankruptcy policy.

obligation is not a *dischargeable* debt in bankruptcy while the license is held, Section 525(a) by its terms does not apply.[18]

5. Finally, we note that, on October 20, 2000, the Fifth Circuit issued a decision in *GWI PCS 1 Inc.*, No. 99-11294, 2000 WL 1528690. Although that decision rejected the government's challenge to a confirmed plan of reorganization and allowed a C-Block bidder to retain 14 broadband PCS licenses while avoiding much of the debtors' bid obligation, the decision does not directly conflict with the decision below on the issue raised in the petition. Indeed, in *GWI*, the Fifth Circuit rejected the government's challenge to the bankruptcy court's confirmation order not because it disagreed with the Second Circuit's decision in this case, but rather because it found that the government's challenge to the bankruptcy court's ruling had become "equitably moot." That doctrine, the court stated, permitted it to "decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available—even though there may still be a viable dispute between the parties on appeal." 2000 WL 1528690, at *5 (citing *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994), cert. denied, 513 U.S. 1152 (1995)). As the Fifth Circuit recognized, 2000 WL 1528690, at *9, equitable mootness principles have no application to the present case, because petitioners' plan of reorganization was never

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[18] Nor can it be claimed that the court of appeals' decision effectively forces parties like petitioner to violate the automatic stay. The license payments were exempted from the automatic stay as payments in the "ordinary course of business." See 11 U.S.C. 363; *In re Lavigne*, 114 F.3d 379, 384 (2d Cir. 1997). Moreover, petitioner could have sought court authorization to make the payments under 11 U.S.C. 363(b)(1). See, *e.g.*, *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1227 (5th Cir. 1986) (approving use of estate funds to pay airplane leases where new aircraft would permit debtor to exploit value provided by commercial air routes).

confirmed. Moreover, as noted above, the Fifth Circuit suggested that it might well have agreed with the Second Circuit in this case if the issue were not equitably moot. The Fifth Circuit specifically observed that the bankruptcy court had "possibly erred in permitting avoidance and enjoining the FCC from revoking the * * * debtor's licenses for failing to remit the full bid price, thereby taking onto itself a quasi-regulatory function held by the FCC," *id.* at * 9, and added that, "if the issue [before it] were not equitably moot," it "might agree with the Second Circuit and reverse the bankruptcy court's avoidance judgment," *id.* at *15 n.31.[19]

To be sure, the Fifth Circuit's decision in *GWI* permits a C-Block bidder to retain PCS licenses without satisfying the condition of full and timely payment of the bid amount upon which the licenses were awarded. For that reason, we believe that the decision is difficult to reconcile with fundamental Communications Act principles. But, unlike petitioner, the debtor in *GWI* did not miss any payment deadlines, and sought and obtained judicial approval for a specific payment plan; as a result, the issue of automatic cancellation never arose. Moreover, the Fifth Circuit's rationale for its decision—equitable mootness—is by its terms inapplicable to cases like this one, in which there is no confirmed plan.

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[19] In light of those statements, the court of appeals' reference to Section 1334(b) in footnote 29 of its decision hardly creates a conflict. Based on a perceived concession by government counsel, 2000 WL 1528690, at *9, the Fifth Circuit read the Second Circuit's decision as relating not to the bankruptcy's court's *jurisdiction* but rather to its *authority*. Compare Pet. App. 104a (Second Circuit describing decision as "hold[ing] that the bankruptcy court had no authority thus to interfere with the FCC's system for allocating spectrum licenses."). For present purposes, the distinction between the bankruptcy court's authority to set aside the FCC's spectrum licensing decisions and its jurisdiction to do so is immaterial. Regardless of how the matter is characterized, in this case the bankruptcy court erred by arrogating to itself spectrum licensing powers that Congress reserved for the FCC.

Accordingly, any decision by this Court in the present case would be unlikely to alter the result in *GWI*, and that decision adds no weight to petitioner's request for further review.[20]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[20] Because the GWI reorganization order "preserved certain challenges to the valuation of the licenses and the amount of * * * the FCC's claim," 2000 WL 1528690, at *9, the Fifth Circuit addressed (and upheld) the substance of the bankruptcy court's avoidance judgment. In doing so, the court expressly "disagree[d]" with the Second Circuit's conclusion in this case that the companies that submitted winning bids in the C-Block auction "became obligated to pay the FCC the full bid price at the close of the auction." 2000 WL 1528690, at *12. Any conflict on that issue between the two courts of appeals is not presented by this petition, which raises only the issue of the bankruptcy court's jurisdiction over the FCC's license award, and not the substance of the bankruptcy court's fraudulent conveyance analysis. Pet. i (Question Presented). Petitioner's earlier petition for a writ of certiorari, No. 99-1980, by contrast did raise the issue, and this Court denied the petition on October 10, 2000.